

FEDERAL COURT OF CANADA

Attorney General of Canada

Applicant

and

Amnesty International Canada and
British Columbia Civil Liberties Association

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

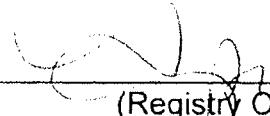
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998*, and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

October 30, 2008

Issued by:



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APPLICATION

This is an application for judicial review in respect of the decision made by the Chairperson of the Military Police Complaints Commission (the "Commission") on September 30, 2008. The applicant first received the decision on September 30, 2008.

The applicant makes application for:

1. A declaration that the Commission has construed complaint MPCC file # 2008-24 beyond the parameter of its jurisdiction in that it is no longer a complaint about the conduct of a member of the military police in the performance of any of the '*policing duties or functions*', as that expression is defined by subsection 250.18(1) of the *National Defence Act*, R.S.C. 1985, c. N-5 and section 2 of the *Complaints About the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065;
2. A declaration that subsection 250.38(1) of the *National Defence Act*, R.S.C. 1985, c. N-5 consequently does not grant to the Commission the jurisdiction to either investigate or hold a hearing into the complaint;
3. An order setting aside the decision of the Chairperson of the Commission to commence a public interest investigation into the complaint;
4. An order setting aside the decision of the Chairperson of the Commission to hold a hearing into the complaint;
5. A writ of prohibition, prohibiting the Chairperson and the Commission from investigating the complaint; and
6. Its costs.

The grounds for the application are:

1. The *National Defence Act* empowers the Commission to investigate only conduct complaints related to the performance of policing duties and functions by members of the military police. To fix the limits of those "policing duties and functions", the regulations made under the *Act* specifically distinguish those duties and functions from duties or functions performed by members of the military police that relate to military operations resulting from established military

custom or practice.

2. The decision to transfer detainees in an operational setting is an operational duty or function, not a military police duty or function.
3. The Commission has received three complaints related to the handling of Afghan detainees.
4. An individual filed the first complaint on January 29, 2007 (MPCC file # 2007-003). The complaint alleges that members of the military police failed to exercise due diligence to investigate allegations about the possible abuse of three individuals apprehended and detained by other members of the Canadian Forces during operations in Afghanistan. The Commission is pursuing its investigation of the first complaint.
5. The respondents filed the second complaint on February 21, 2007 (MPCC file # 2007-006). The second complaint alleges that the Canadian Forces Provost Marshal and other unidentified Canadian Forces military police members either knew or were wilfully blind to information about the treatment, including torture, by various Afghan security forces of detainees transferred from Canadian Forces Military Police custody.
6. The applicant is seeking judicial review of the decision of the Commission to hold a public hearing into the second complaint (Federal court file T-581-08).
7. On June 12, 2008, the respondents wrote to the Commission seeking to expand the time parameters of the second complaint. They also filed a third complaint, alleging that members of the military police had failed to investigate Canadian Forces officers who directed the transfer of detainees to Afghan authorities (MPCC file # 2008-24).
8. On June 12, 2008 the Commission sought submissions from the parties to six questions raised by this letter. The Commission expressly directed the applicant to only supplement the submissions he had made in his application for judicial review.
9. On September 30, 2008 the Commission decided to expand the temporal parameters of the second complaint, as requested by the respondents. It also:

- a) declared that it had jurisdiction over all matters raised in the second complaint;
- b) named the Canadian Forces Provost Marshal and the Task Force Provost Marshal as the subjects of the second complaint because they would be the only persons in the '*military police command structure ... positioned to address the systemic issues*' it raised.

10. Expanding the temporal parameters of the second complaint did not clothe the Commission with jurisdiction. The second complaint remains a complaint about the decision of the chain of command to transfer detainees, a matter of military operations resulting from established military custom or practice, not a military police duty or function.

11. In his September 30, 2008 decision, the Chairperson of the Commission also:

- a) decided the Commission had jurisdiction over the third complaint, relying on information not previously disclosed to the parties;
- b) characterized the third complaint as dealing with systemic issues '*resulting from a lack of direction and appropriate guidance from the upper command of the CF Provost Marshal's office*';
- c) decided to investigate the third complaint;
- d) named the Canadian Forces Provost Marshal, the Task Force Provost Marshal, the Commanding Officer of the National Investigation Service and the officer (or warrant officer) in charge of the NIS detachment in Afghanistan from May 3, 2007 to June 12, 2008 as the subjects of the third complaint;
- e) decided to commence a public interest hearing into the third complaint and ordered that the public hearing into the second and third complaints would proceed at the same time.

12. By relying on evidence not disclosed to the parties and not available to them for comment, the Commission violated the legitimate expectations of the applicant and his right to procedural fairness.

13. By framing the third complaint as a 'systemic' complaint, the Commission erred in fact and law. A conduct complaint is a complaint concerning the conduct of an identifiable member of the military police – the subject of the complaint; it is about the performance of that subject's policing duties or function; it puts the reputation of its subject at issue. A 'systemic' complaint cannot be a conduct complaint because it lacks the specificity required to allow its subject to defend his or her reputation.

14. Further, by framing the third complaint as systemic, the Commission also erred in law on a matter of general public importance. The constitutional underpinnings of the office of a police officer investigating a crime vest this police officer with independence; they also give this police officer the discretion to investigate or not. To investigate, a police officer needs to have a reasonable suspicion that an offence might have been committed, based on an objective review of all the facts known to him, when taken together. Thus, the allegation that members of the military police failed to investigate a possible offence cannot be, in law, a 'systemic' complaint.

15. Without any evidence of the occasions on which identifiable members of the military police failed in the exercise of their discretion, it was legally impossible for the Commission to conclude that it was in the public interest to conduct an investigation into the third complaint and to hold a hearing into it.

16. Under colour of investigating conduct complaints, the Commission is in fact attempting to review the policy decisions made by governmental officials in relation to the transfer of Afghan detainees by the Canadian Forces to the Afghan authorities. The review of this question of governmental policy falls outside of the confines of the mandate of the Commission: it involves persons who are not members of the military police in the performance of duties which are not policing duties or functions.

17. The *National Defence Act*, R.S.C. 1985, c. N-5, s. 2, 156, 250, 250.18(1), 250.19, 250.21(1), 250.38(1).

18. The *Complaints about the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065.

19. The *Federal Court Act*, R.S.C. 1985, c. F-7, s. 18 and 18.1.

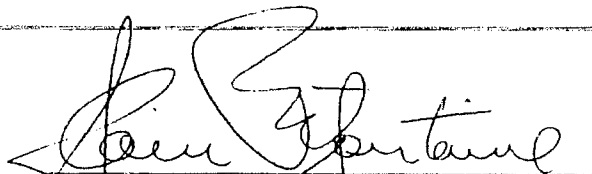
The following material will support the application:

1. The affidavit of an affiant to be identified;
2. Such other material as counsel may advise and the Court permit.

**REQUEST FOR RECORD OF DECISION
(rule 317 F.C.R.)**

The applicant hereby requests transmission of material relevant to this application that is in the possession of the Military Police Complaints Commission, including a complete version of all documents relied upon or cited in the decision issued September 30, 2008.

October 30, 2008



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Of counsel to the applicant

I HEREBY CERTIFY that the above document is a true copy of the
original issued on _____ day of _____ 30
day of _____ oct _____ 2008
Dated this 30 day of _____ oct _____ 2008



Ann E. M.
Registry C.
Agente de groné